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No. 89-1197

In The

Supreme Court of the United States

October Term, 1989

CITY OF ST. GEORGE, UTAH,

Petitioner,

v.

PHILLIP L. FOREMASTER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April 2, 1990.

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QUESTIONS PRESENTED

1. Should this Court grant a Writ of Certiorari where the issues raised below have been rendered moot by the actions of the Petitioner and by a third party?

2. Should this Court grant a Writ of Certiorari where the remaining factual issue is not ripe for decision?

3. Should this Court grant a Writ of Certiorari to examine whether a resident and citizen has standing to challenge the pervasive use of a City logo depicting the religious building of one religion?

4. Should this Court grant a Writ of Certiorari to examine whether a resident, ratepayer and taxpayer has standing to challenge an electrical subsidy given to one church through municipal power system?

5. Should this Court grant a Writ of Certiorari to examine whether a City violated the Establishment Clause by providing a Church free electricity to the exclusion of all other private organizations, secular and non-secular?

6. Should this Court grant a Writ of Certiorari to examine whether the Tenth Circuit properly remanded a part of this case in order to receive more evidence on whether a City logo violated the Establishment Clause?

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Respondent Phillip L. Foremaster, ("Foremaster"), submits the following Brief in Opposition to the Petition for a Writ of Certiorari filed by the City of St. George, Utah ("City of St. George").

STATEMENT OF THE CASE

A. Background.

Respondent, Phillip L. Foremaster was a resident, a taxpayer, an electrical ratepayer and a voter in the City of St. George. When he filed this action, Foremaster resided

in St. George, and paid for one-half (1/2) of the electrical service to his residence (Petition for a Writ of Certiorari [hereinafter, Petition], p. 5a; Response to Plaintiff's Second Request for Admissions [hereinafter, City's Admissions], ¶ 5).

Petitioner, the City of St. George (the City), operates its own municipal electrical system (City's Admissions, ¶ 12).

The Church of Jesus Christ of Latter-day Saints (hereinafter sometimes the Mormon Church or Mormon) is an unincorporated association organized for purposes of conducting a religion. That Church owns a religious building in the City, known herein as the Temple, which is used exclusively for activities held sacred by the Mormons (Petition, pp. 20a-23a (and notes therein)). The general public may not enter the Temple. In fact, only those select members of the Mormon Church who have met Church established standards of "worthiness" may enter the Temple (*Id.* at 22a).

The Mormon Church actively seeks converts through advertising, missionaries and proselytizing. The Temple and its Visitor's Center are advertising and proselytizing tools of the Mormon Church. In 1985, more than one-quarter million people visited the Visitor's Center (Defendant's Answers to Second Set of Interrogatories [hereinafter, City's Second Answers], ¶ 48; *see also* Petition, p. 23a).

All Mormon temples are prominent and highly visible, through illumination at night and by their location. They tend to be strikingly and dramatically designed. The St. George Temple sits on a knoll and is the predominant man-made structure of the area. The pure white

stucco exterior sets the St. George Temple apart from the surrounding natural red sand and stone (Petition, p. 3; Memorandum Re: Significance of Temples of the Church of Jesus Christ of Latter-day Saints [hereinafter, Memo Re: Temples]).

Mormon temples are described by Church leaders as "beacons" and "ensigns" for this mortal world, to aid members and non-members alike (Memo Re: Temples). A Mormon temple has great and significant symbolic meaning to Church members (and non-members). Symbolically, a cross is to Christianity as a Mormon temple is to the Mormon Church. A cross and a Mormon temple each symbolize the core, main tenets, basic thought and essence of those two religious groups (*see* Petition, pp. 20a-23a; Memo Re: Temples). A Mormon temple constitutes a physical manifestation and symbol of that Church and is clearly and exclusively religious in character (City's Admissions, ¶ 26).

B. The Electrical Subsidy.

In 1942, the City began crediting the Mormon Temple's electric bill, subsidizing the late-night illumination of the Temple at City expense. The City's gift of electricity was as high as one hundred eighty dollars ($180.00) per month (Petition, p. 3). The subsidy was discontinued in 1986, after Foremaster filed this action, because the St. George Temple President declared that the Church was willing to assume the cost of the late-night illumination of the Temple (Petition, pp. 46a, 48a). Three persons who were members of the St. George City Council when they were deposed in 1987, indicated that they might resume

the electrical subsidy in the future, "if the Mormon Church were to change its policy (of paying for the electricity it uses to illuminate the Temple)." (Petition, pp. 3-4 n.3). At least one of the persons deposed is no longer a member of the City Council.[1]

Petitioners declare that the gifts of electricity were initiated to promote tourism (Petition, p. 3 n.3).[2] Significantly, the City has never provided free electricity to any other privately owned tourist attraction (City's Second Answers; City's Admissions).

The Tenth Circuit Court of Appeals held that the forty-four (44) years of free electricity to the Temple economically harmed Foremaster, and all other City taxpayers and ratepayers (Petition, p. 5a & n.3). The City admits that the electricity gifts reduced the City's revenues (Petition, p. 15 n.9). In fact, the City concedes that the electricity give-away resulted in the expenditure of a substantial amount of public funds (City's Admissions ¶ 22(a)).

Foremaster also suffered non-economic loss. He could not avoid seeing the illuminated Temple because it is the "predominant man-made structure of the entire city and area." (Petition, p. 3). Significantly, the City admits that illuminating the Temple "may indirectly serve to arouse curiosity on the part of non-members of the Church of Jesus Christ of Latter-day Saints." (Defendant's

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[1] More importantly, the former declarations by council members, past or current, concerning possible council decisions about uncertain events cannot dictate future City policy.

[2] There is no record of the City Council meeting in 1942 when the City authorized the gifts.

Amended Answers to First Set of Interrogatories [hereinafter, City's Amended Answers], ¶ 42(e)).

The unavoidable sight of the taxpayer-lighted Temple (along with the unavoidable contact with the City logo, *infra*), subjected Foremaster "to an unwelcome religious exercise through [the actions of] the city government and the municipal power company." (Petition, pp. 66a-67a). Short of moving his residence and his business to another city, Foremaster could not avoid the unwelcome religious exercise.

The City no longer gives free electricity to the Mormon Temple. Therefore, the controversy surrounding the subsidy has ended.

C. The City Logo.

The City of St. George formerly used a logo to identify the City. The logo served "as a 'descriptive, colorful, attraction-getting' symbol to advertise the St. George area." (Petition, p. 4). The only structure depicted on the logo was the St. George Temple (Petition, p. 69a (a non-colored duplicate of the logo)).

When this suit was filed, the logo was displayed on (a) eighty or ninety city vehicles (approximately two-thirds (2/3) of the non-emergency, non-police vehicles), (b) a wall plaque in the main foyer of the St. George City Hall, (c) on two (2) directional signs near the City Hall parking lot, and (d) on a flag in the City Council chambers. Additionally, before 1981, the logo was displayed on City stationery. (Petition, p. 19a).

Currently, however, the logo is displayed on only the two (2) directional signs and on the single wall plaque at City Hall. (*Id*). As with the electrical subsidy, the controversy surrounding the logo has ended. Additionally, the question of whether the logo violated the Establishment Clause is currently before the District Court, on remand (Petition, p. 14a).

Foremaster suffered non-economic injury from his unavoidable exposure to the City logo that advertised the Temple – a symbol of unquestioned religious significance (*see* Petition, pp. 20a-23a, discussed *supra*). In 1986, before the City terminated the electrical subsidy and its pervasive use of the logo, Foremaster declared:

> The visual impact of seeing that Temple on a daily basis as part of an official emblem of the City on official vehicles, on City stationery, on the City flag, on plaques at the City Hall, etc., has and continues to greatly offend, intimidate and affect me. . . . By the conduct of the City as to the electrical subsidy and the use of the City seal, I feel that I am being subjected to an unwelcome religious exercise. . . .

Petition, pp. 66a-67a. Again, the only way Foremaster could have avoided the unwelcome religious exercise embodied by logo, was to have moved his residence and his business to another city.

SUMMARY OF REASONS FOR DENYING THE WRIT

I. The issues presented below are now moot. The electrical subsidy was terminated in 1986. The City's pervasive use of the offensive logo has also ended.

II. The issue of the City logo is not ripe for review. The Tenth Circuit remanded the case to hear evidence as to the primary effect that the picture of the Church Temple might have on the casual observer. The lower court decision may obviate all need for review. Refusing certiorari at this point will not prejudice the Petitioner's future rights to appeal.

III. The Respondent had standing to challenge the pervasive use of a City logo based on the non-economic injury he suffered. An unwelcome religious message was embodied in the City logo. The Respondent was unable to avoid the City's religious message without moving to another city.

IV. The Respondent had standing to challenge the City's gift of electricity to a single Church. First, the respondent suffered economic injury. Because the gift drained municipal resources, the Respondent, along with all nonbeneficiary taxpayers and ratepayers, bore the burden of compensating for the City's gifts to the single Church. Second, as a taxpayer and a ratepayer, the Respondent has "taxpayer standing" to challenge the City Council's spending that violated the Establishment Clause. Third, because the Respondent was forced to endure the religious exercise embodied by the City sponsored illumination of the single Church – with no ability to avoid it unless he moved to another city – the Respondent suffered non-economic injury sufficient to confer standing.

V. The City sponsored illumination of a single Church, violated the Establishment Clause. First, because the City gave electricity to only one Church, and to no

other tourist attractions, the policy behind the gifts could not have a secular purpose. Second, the policy of giving electricity to a single Church endorsed and promoted a single religion, to the exclusion of all other beliefs. Nothing, such as the illumination of any other privately owned buildings, served to dilute the City's apparent endorsement of the single religious belief. Therefore, the primary effect of the electricity gifts was to endorse one religion. Finally, City monitoring of the interaction between the Church officials and the tourists drawn by the City sponsored illumination would have hopelessly entangled City and Church affairs.

VI. The Tenth Circuit did not err in remanding the issue of the City logo to the District Court. Where an appellate court must decide whether a governmental practice, *as applied*, has the primary effect of advancing a religious belief, the issue is more that a mere question of law. Therefore, the Tenth Circuit properly remanded the case to resolve the question of what effect the logo had on the casual observer.

REASONS FOR DENYING THE WRIT

I. THE ISSUES RAISED ARE MOOT.

Article III, section 2 of the Constitution deprives this court of subject matter jurisdiction over cases lacking live controversy. *See e.g., St. Pierre v. U.S.*, 319 U.S. 41, 42 (1943)("a federal court is without power to decide moot questions or to have advisory opinions which cannot affect the rights of the litigants in the case before it.") *overruled on other grounds, Pennsylvania v. Mimms*, 434 U.S.

106. Because the City has stopped providing free electricity to the Church, and because the City has ceased its pervasive display of the City logo, the issues of this case are moot. Hence, this Court does not have jurisdiction to hear the appeal.

A. The Electricity Subsidy.

The issue of the electricity subsidy is moot because a third person's actions caused the termination of the subsidy. *See Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983). In *Iron Arrow*, an all-male student organization filed suit to prevent enforcement of an anti-discrimination statute banning all-male organizations from private schools. While on appeal, the private school declared that it would ban the organization whether or not the ban was mandated by the statute. The unilateral action of the school mooted the issue of the statute's enforcement. Consequently, this Court remanded to the lower court with an order to dismiss because the issue was moot. *Id.*

An otherwise moot issue will not confer jurisdiction on a court simply because there is a possibility the issue may arise some time in the future. In other words, "[a] hypothetical threat is not enough." *Golden v. Zwickler*, 394 U.S. 103, 110 (1969).

The issue regarding the lighting of the Mormon Temple is moot. Just as in *Iron Arrow, supra*, a third party has defused the issue. On November 5, 1986, the President of the St. George Temple told the City that the Temple would henceforth pay for lighting the Temple at night. The following day, the St. George City Council acquiesced

in a decision by the City Manager to terminate the electricity subsidy, because (1) the Temple President had offered to pay for all electricity received, and (2) the council hoped to end the *Foremaster* litigation by terminating the subsidy. Petition, p. 24a. For over three years, the City has not given free electricity to the Mormon Church. Consequently, there is no live issue regarding the electricity subsidy over which this Court may exercise jurisdiction.

Three members of the St. George City Council, however, asserted in 1987 that the City might resume the electricity subsidy to the Temple in the future. Petition, pp. 3-4 n. 3. The vague threats of future council action concerning uncertain events made by council members who, if and when the events actually occur may no longer even be members, cannot dictate future City policy. The "hypothetical threat" from past or present Council members does not meet Article III requirements for a live controversy.

The electricity subsidy issue is a moot issue. The City does not currently give the church free electricity, nor are there plans to do so. Therefore, this Court should not grant a Writ of Certiorari to hear the subsidy issue.

B. The City Logo.

The City logo is also a moot issue. At the time this action was filed, the logo was pervasively displayed. The logo had been on city stationery and envelopes. It was on between eighty and ninety city vehicles – approximately two/thirds (2/3) of the city vehicles excluding police and emergency vehicles. The logo was on a historical plaque and two parking lot signs at the City Hall, and on a flag

in the City Council chambers. Petition, p. 19a. Today, the City logo remains on the historical plaque, and on the two directional signs in a City parking lot, only. *Id.*

The use of the offending logo is no longer pervasive. Thus, Foremaster no longer suffers daily injury by being unavoidably forced to either accept its unwelcome religious message, or bear a special burden to avoid it (*see* discussion of standing and non-economic injury, *infra*, Section III). The issue of the City logo is moot. Therefore, the Court is without jurisdiction to adjudicate the issue.

II. ISSUES REGARDING THE EFFECT OF THE LOGO ARE NOT RIPE FOR REVIEW BY THIS COURT.

It is inefficient and inappropriate for the Court to rule on the logo issue until the trial court has made a decision as to the logo's primary effect. *See* Petition, pp. 13a-14a. "Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Sup. Ct. R. 17.1. Due to the finite institutional capacity to accept cases and the policy not to review issues unless necessary, this Court imposes sharp limits on certiorari discretion. Wright, Miller and Cooper, *Federal Practice Procedure* (1988) §4004, p.508; *see e.g., Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1950).

In determining whether to grant certiorari, the Court must consider "the appropriateness of the issues for decision and the actual hardship to the litigants" if certiorari is denied. *Poe v. Ullman*, 367 U.S. 497, 509 (1961); *Joint Anti-Fascist Refugee Committee v. McGrath, supra.* For

example, the Court may defer ruling on an issue until some judicial or legislative event occurs that may affect the appropriateness of review or provide a better prospective for decision. R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice (6th ed. 1986) at 377. In fact, on occasions the Court has decided to withdraw grants of Writs of Certiorari because subsequent judicial or legislative action made the grants improvident. *See Cook Zv. Hudson*, 429 U.S. 165 (1976); *Picirillo v. New York*, 400 U.S. 548 (1971); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1971)(opinion of Justice Harlan); *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955).

In the instant case, the Tenth Circuit remanded to determine whether the City's pervasive use of the logo violated the Establishment Clause. Petition, pp. 13a-14a. The District Court has not yet ruled. If the District Court does not find an Establishment Clause violation, then every issue ancillary to the logo issue will be moot. If the District Court finds an Establishment Clause violation, however, then every avenue of appeal will still remain open – petitioner will suffer no prejudice if this Court denies the Petition for a Writ of Certiorari at this time. Therefore, in the interest of judicial economy, this Court should not hear the logo issue before the lower court renders a judgment.

III. THE COURT OF APPEALS PROPERLY FOUND THAT A CITIZEN AND RESIDENT HAD STANDING TO CHALLENGE USE OF A CITY LOGO CONTAINING A PICTURE OF A MORMON TEMPLE.

Both the U.S. District Court and the Tenth Circuit Court of Appeals correctly found that Foremaster had

standing to challenge the City's logo because Foremaster had suffered non-economic injury. Further, there is no conflict between the Circuits over the definition of non-economic injury in a case such as this.

Standing requires that certain constitutional and prudential conditions be met. *See e.g., Valley Forge College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472, 474-475 (1982)(hereinafter *Valley Forge*). The key issue in this case, as well as those discussed below, is whether the plaintiff has suffered a sufficient non-economic injury.

In *Valley Forge* the Court declared that a "spiritual stake" in the outcome of the litigation was not an injury sufficient to confer standing to the plaintiff. *Id.* 454 U.S. at 486-487, n. 22. In an oft-quoted passage from *Valley Forge,* 454 U.S. at 486-487, n. 22, this Court explained and reaffirmed the basis for the plaintiffs' standing in *Abington School Dist. v. Schempp,* 374 U.S. 203 (1963). The Court explained that in *Abington School Dist.,* the plaintiff children and their parents had standing to challenge optional prayer in public school, "not because their complaint rested on the Establishment Clause . . . but because impressionable school children were subjected to unwelcome religious exercises *or* were forced to assume special burdens to avoid them." *Valley Forge,* at 486-487, n. 22 (emphasis added).

The Tenth Circuit, in *Foremaster,* found "particularly persuasive" the reasoning in *Hawley v. City of Cleveland,* 773 F.2d 736 (6th Cir. 1985) *cert. denied,* 475 U.S. 1047 (1986). Petition, p. 10a. In *Hawley,* the plaintiffs challenged the placement of a chapel in the city airport. From

the outside of the chapel, the only indications of religious exercise would be a simple sign and perhaps some stained glass windows. *Id.*, at 737. The plaintiffs could have gone out of their way to avoid passing the chapel. The court found that plaintiffs had standing because they were forced to " 'assume special burdens' to 'avoid unwelcome religious exercises.' " *Id.*, at 740 (*quoting Valley Forge*, at 486-487, n. 22).

In the immediate case, Foremaster had direct and personal contact with the City's logo and its depiction of the Mormon Temple. Petition, p. 11a. Foremaster's contact was unavoidable because the City used the logo on most City cars, on a plaque, on a flag, on stationery, and on various signs. Petition, p. 19a.

Foremaster was forced to either subject himself to an unwelcome religious exercise, or assume a special, and perhaps impossible burden to avoid them. *See* Petition, pp. 66a-67a (*quoted* in Statement of the Case). Foremaster suffered injuries that are nearly indistinguishable from the non-economic injuries suffered by plaintiffs in *Abington School Dist.* and in *Hawley*. Therefore, Foremaster had standing.

Petitioner asserts that there is a difference in interpretation of *Valley Forge, supra*, by the Sixth, Tenth, and Eleventh Circuits, as opposed to the Seventh Circuit's interpretation. Petition, p. 10; *see also Id.*, at 10a. This Court has clearly explained that where the plaintiff *either* personally and actually faces unwelcome religious exercises, *or* must assume a special burden to avoid them, the plaintiff has standing. *Valley Forge*, 454 U.S. at 486-487, n. 22 (*citing Abington School Dist., supra*). That recipe for

standing harmonizes each case cited by Petitioner and shows no conflict between the Circuits.

For example, in one Seventh Circuit case, *ACLU v. City of St. Charles*, 794 F.2d 265 (1986) *cert. denied*, 479 U.S. 961 (1986), plaintiffs were faced with either traveling their customary routes and facing an unwelcome cross displayed on public property, or changing their routes, thereby assuming a special burden. The court found plaintiffs had standing. *Id.* at 268-269 (*citing Abington School Dist.*, and *Valley Forge, supra*). *See also Freedom From Religion Foundation v. Zielke*, 845 F.2d 1463 (7th Cir.1988)(no standing for plaintiffs who were neither regularly exposed to a religious monument in a city park, nor burdened in order to avoid it).

In the Eleventh Circuit case of *Saladin v. City of Milledgeville*, 812 F.2d 687 (1987) the court found standing where plaintiffs were regularly and unavoidably exposed to a city seal that expressly promoted Christianity. The only plausible means by which plaintiffs could have avoided exposure to the seal would have been moving from their home – a special burden, indeed. *See also Hawley v. City of Cleveland, supra* (plaintiffs suffered injury and had standing when faced with either exposure to an airport chapel or altering their normal routes to avoid it); *ACLU v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983)(two plaintiffs suffered injury and had standing when forced to either tolerate a brightly lighted cross at a state camping area, or assume the burden of not camping at the public area; alternatively, one plaintiff whose summer cabin faced the lighted cross was forced to either accept the unwelcome religious exercise, or assume the special

burden of moving, therefore he suffered injury and had standing).

Every plaintiff in each case discussed above faced the same "either or" choice. In the case at bar, Foremaster was faced with either constantly encountering the unwelcome logo, or assuming the special and nearly impossible burden of avoiding it. There is no conflict between the Circuits, and there is no doubt of Foremaster's injury from the City logo.

IV. THE COURT OF APPEALS PROPERLY FOUND THAT A RATEPAYER AND TAXPAYER HAD STANDING TO CHALLENGE A SUBSIDY BY A MUNICIPAL UTILITY BENEFITING ONE CHURCH.

The respondent, Foremaster, had standing to challenge the City's gift of electricity to one church as a violation of the Establishment Clause. Foremaster's standing rested upon at least three grounds.

First, as the Tenth Circuit correctly found, Foremaster suffered economic injury. Petition, p. 5a. In *Texas Monthly v. Bullock*, 489 U.S. ___, 103 L.Ed.2d 1, 109 S.Ct. 890 (1989), a Texas statute granted a sales tax exemption to publications that were strictly religious in nature. The exemption did not extend to any secular publications. The plaintiff challenging the exemptions was a general interest magazine not benefited by the exemptions. The Court held that the plaintiff had standing by virtue of the tax it had paid at the same time the religious publications were paying

nothing. The Court also stated that "[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious donors." *Id.* 103 L.Ed.2d at 13 (quotes and cites omitted).

In the case at bar, Foremaster was a utility ratepayer and a taxpayer. Petition, p. 5a. The gift of electricity to one church for forty-four (44) years, simply put, benefited the church, and drained finite municipal resources. Unquestionably, the years of free electricity resulted in either higher utility rates or higher municipal taxes. The City concedes that the electrical subsidy diminished municipal assets. *See* Petition, p. 15, n. 9 (the gift of electricity "reduce[d] the return to the shareholder, the City."). The subsidy to the church forced Foremaster to become a donor to the extent necessary to offset the subsidy. Consequently, as a ratepayer or a taxpayer, Foremaster suffered economic harm. That harm ceased when the City halted the electricity give-away. Foremaster had standing by virtue of his redressable economic injury.

Second, Foremaster had taxpayer standing. This Court, in *Flast v. Cohen*, 392 U.S. 83 (1968), recognized a special exception to the general rule against taxpayer standing. Essentially, where the taxpayer claims a violation of the Establishment Clause has occurred through an expenditure of tax funds, the taxpayer has standing. *Flast v. Cohen, supra, see also Grand Rapids School District v. Ball,* 473 U.S. 373, 380, n.5 (1985)(citing "numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools).[3] Petition, pp. 14-17. In *Marsh v. Chambers,*

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[3] *See Bowen v. Kendrick,* ___ U.S. ___, 101 L.Ed.2d 520, 108 S.Ct. 2562, 2579 (1988) (the Court has "consistently" adhered to

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463 U.S. 783 (1983), for example, the Court declared that a state taxpayer who challenged the expenditure of state taxes to fund a legislative chaplaincy had standing to assert a claim of Establishment Clause violation. *Id.* 463 U.S. at 786, n. 4.[4]

As a ratepayer and a taxpayer (Petition, p. 5a), Foremaster has challenged as violative of the Establishment Clause, the St. George City Council's 1942 decision to provide free electricity to a single church. Thus, he had standing.

Third, Foremaster has suffered a non-economic injury identical to his injury caused by the pervasive use of the City logo. Every night, Foremaster was forced to either endure the unwelcome religious exercise of seeing the Temple illuminated at taxpayer expense, or bear a special and perhaps impossible burden to avoid it. Petition, pp. 66a-67a. *See* Section III, *supra* (discussing the "either or" test to establish standing to challenge Establishment Clause violations). The St. George Mormon Temple is the predominate man-made feature of the City and can be seen from almost every location in town. At night, a person cannot avoid seeing the lighted Temple. The City's illumination of the Temple caused Foremaster non-

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Flast and the narrow exception it created to the general rule against taxpayer standing").

[4] In asserting that Mr. Foremaster lacked taxpayer standing, petitioner does not cite one case that involves an alleged violation of the Establishment Clause resulting from governmental spending.

economic injury. Therefore, he had standing to challenge the City's gift of electricity.

V. THE COURT OF APPEALS PROPERLY FOUND THAT A MUNICIPALITY VIOLATES THE ESTABLISHMENT CLAUSE WHEN IT GRANTS A SUBSIDY TO A CHURCH WITH THE PRIMARY EFFECT OF ENDORSING AND BENEFITING THAT RELIGION TO THE EXCLUSION OF ALL OTHERS.

The Court of Appeals for the Tenth Circuit correctly found that the City's provision of free electricity to one church, to the exclusion of all other secular and nonsecular organizations, violated the Establishment Clause. Petition, p. 8a. Gifts of electricity to the Mormon Temple would comport with the Establishment Clause only if the gifts have a secular purpose, the gifts neither advance nor inhibit religion in their primary effect, and the gifts do not foster excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

A. *Secular Purpose.* As to the secular purpose requirement, "the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Texas Monthly v. Bullock*, 103 L.Ed.2d at 14 (*quoting Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 696 (1970)). In other words, where a governmental policy has a secular purpose that incidentally benefits a nonsecular group or groups, along with other groups that promote the secular

purpose, the policy may stand. *Texas Monthly v. Bullock*, 103 L.Ed.2d at 10.[5]

Where, however, a governmental policy (1) benefits nonsecular interests, (2) substantially burdens nonbeneficiaries, and (3) is not mandated by the Free Exercise Clause, the policy is especially suspect. In *Texas Monthly v. Bullock, supra*, the tax exemptions benefited only religious publications. The selective tax exemption substantially burdened all nonbeneficiaries by increasing their tax bills by whatever amount was needed to offset the exemptions. The tax exemption was not mandated by the Free Exercise Clause. *See Texas Monthly v. Bullock*, 103 L.Ed.2d at 15-16, n. 8. The Court invalidated the tax exemption.

In the case at bar, the City of St. George gave free electricity to only one church. The purported secular purpose was to promote tourism – although the City is unable to produce any records from the 1942 City Council meeting where the subsidy was originally granted. No other organizations that promoted tourism received free electricity. At the same time, the ongoing gift of city resources to the single church clearly increased the burden shouldered by both the secular and nonsecular non-

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[5] *See e.g., Mueller v. Allen*, 463 U.S. 388 (1983) (upholding tax deduction where the purpose was to ensure an educated citizenry, and the deduction benefited families with children in secular private schools and families with children in nonsecular private schools); *Walz v. Tax Comm'n of N.Y.C., supra* (upholding property tax deduction where the secular purpose was to foster the "moral or mental improvement" of society, and the deduction benefited both secular and nonsecular groups that promoted that purpose).

beneficiaries. Petition, p. 5a. With reasoning that exactly parallels this Court's reasoning in *Texas Monthly v. Bullock, supra,* the Tenth Circuit found that the benefit conferred upon the Mormon Church was not necessitated by the Free Exercise Clause. Consequently, the Tenth Circuit Court of Appeals correctly invalidated the electricity give-away. Petition, 8a.

B. *Primary Effect.* The "primary effect" leg of the *Lemon* test under the Establishment Clause, prohibits a government from even "appearing" to endorse, favor, or promote a particular religious belief. *Allegheny County v. Greater Pittsburgh ACLU,* ___ U.S. ___, 106 L.Ed.2d 472, 109 S.Ct. 3086, 3101 (1989). To determine whether a governmental practice impermissibly endorses a religious belief, the first consideration is whether the practice communicates a religious message. The second consideration is whether the effect of the message is somehow diluted by the setting in which the message is delivered. *Id.,* at 3103 (where a creche is prominently displayed alone, the government's endorsement of Christianity is not diluted).

In the case at bar, the government sponsored illumination of the St. George Mormon Temple conveyed a religious message. The religious significance of Mormon temples is great and undisputed. Non-Mormons who visit temples grounds may enter only the visitor centers that are located nearby.[6] The visitor centers advertise and proselyte for the Mormon religion. Petition, pp. 20a-23a.

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[6] Mormon temples are "places of revelation." Mormon temples are used for the most significant and sacred rites of the

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The message sent by government sponsored illumination of the St. George Temple is no less potent than the message sent by a government choosing to illuminate a huge cross, Star of David, Buddha figure or statue of Siva. The message is that the sponsoring government endorses a particular religious belief.

Nothing serves to soften or dilute the message of religious endorsement in this case. The City does not sponsor the illumination of any other privately owned tourist attractions. Indeed, the message is amplified because the only building which tourists may enter is a center for advertising the Mormon religion.

The City's illumination of the Temple sends a message that the city endorses a particular church. The message is not diluted by anything else present in the setting in which the message is delivered. Hence, the gift of electricity to illuminate the Temple violated the Establishment Clause because the primary effect was to endorse a single religious sect.

C. *Entanglement.* Entanglement of church and state is restricted by the Establishment Clause to prevent, "as far as possible, the intrusion of either into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. at 614.

In the case at bar, the government sponsored illumination of the Temple, from 10 p.m. until dawn, was

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Mormon church. Once dedicated for use, the Mormon temple interiors are closed not only to non-Mormons, but also to Mormons who do not meet certain standards of "worthiness." Petition, pp. 20a-23a.

purportedly to attract more tourists into the City.[7] Presumably, some tourists visited the Temple grounds after seeing the "Temple's aesthetic values" highlighted by the nightly illumination. Petition, p. 3. For City officials to ensure that visitors were not subjected to nonsecular influence while on Temple grounds would require an absurd level of monitoring and consequent impermissible entanglement.

VI. THE COURT OF APPEALS PROPERLY REMANDED THIS CASE TO HEAR EVIDENCE CONCERNING THE "PRIMARY EFFECT" UPON A CASUAL OBSERVER OF THE CITY LOGO DEPICTING THE MORMON TEMPLE.

The Tenth Circuit did not err in remanding this case so the District Court could hear evidence on whether the City logo violated the "primary effect" leg of the *Lemon* test. This Court recently followed an identical track. *Bowen v. Kendrick*, ___ U.S. ___, 101 L.Ed.2d 520, 108 S.Ct. 2562 (1988).

In *Bowen v. Kendrick, supra*, the Court distinguished "facial" Establishment Clause violations from "as applied" violations. While the distinction had rarely been made before, the Court noted that there had been evaluation of Establishment Clause claims that were clearly facial in nature: the government practice was evaluated without any evidence of how the practice had actually been applied. *Id.* 108 S.Ct. at 2569. By contrast, there had been other claims where both the governmental practice

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[7] No evidence was presented as to the number of tourists who actually viewed the Temple during those late night hours.

and the application of the practice were scrutinized for Establishment violations. *Id.*, at 2570 (noting that an otherwise valid statute authorizing grants might be challenged, as applied, on the basis of a particular grant's impermissibility).

In *Bowen* the Court found the challenged statute to be facially valid. *Id.*, at 2579. The Court then examined whether the statute was valid as applied. The Court found, however, that there was evidence about how the statute was being administered that had not been considered by the lower court. Consequently, this Court remanded the case to determine whether the statute, as applied, had the primary effect of advancing or inhibiting religion. *Id.*, at 2580-2581.

In this case, the Tenth Circuit was clearly examining facts surrounding the practice of giving away electricity to promote tourism. As such, the court was examining the practice as it was applied. The Court of Appeals also decided that the message conveyed by the logo, including a picture of the Temple, would determine whether the logo had the primary effect of advancing a religion. Petition, pp. 13a-14a. The court quoted from three versions of what message the picture of the Temple on the logo communicated – no one version was consistent with the others. *Id.* Just as this Court remanded *Bowen v. Kendrick, supra,* the Tenth Circuit remanded *Foremaster* to determine the primary effect of the logo. *Id.*, p. 14a. The remand was proper and the remand was precisely in line with precedent set by this Court.

CONCLUSION

The crucial issues raised in this matter are moot. The remaining factual issue – the primary effect of the City logo – should be resolved by the trial court before this Court grants a Writ of Certiorari.

The Tenth Circuit followed the decisions of this Court with regard to determining Foremaster had standing to challenge the electricity subsidy and to challenge the religious building being pictured on the City logo.

The Tenth Circuit correctly found that the City's gifts of electricity to a single church violated the Establishment Clause. Finally, the Tenth Circuit followed this Court's direction in remanding the issue concerning the public's perception of the City logo.

The petition of the City of St. George, Utah for a Writ of Certiorari should be denied.

Respectfully submitted,

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April 2, 1990